UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LARS T., LTD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-347-P-H***
	)	
NEW PENN MOTOR EXPRESS, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION OF DEFENDANT NEW PENN MOTOR EXPRESS, INC. FOR PARTIAL SUMMARY JUDGMENT

Defendant New Penn Motor Express, Inc. ("New Penn"), one of two defendants in this action, seeks partial summary judgment limiting its liability for damages on the plaintiff's claim in this action that has been removed to this court from the Maine District Court (Southern Oxford). I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must

demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Procedural Issue

In its reply to the memoranda of law filed in opposition to its motion, New Penn asserted in summary fashion that defendant United Rentals, Inc. lacks standing to oppose the motion and asked the court to strike United Rentals' memorandum of law. Defendant New Penn Motor Express, Inc.'s Reply Memorandum in Support of Motion for Summary Judgment (Docket No. 20) at 5. I ordered the two defendants to submit briefs on this issue. Procedural Order (Docket No. 21). The defendants complied, and it is necessary to address this issue before proceeding to consider the merits of the motion.

New Penn contends that one defendant may not oppose another defendant's motion for partial summary judgment because the defendants are not "adverse" parties. Fed. R. Civ. P. 56 refers to the party opposing a motion for summary judgment as the "adverse party." United Rentals has not filed a cross-claim against New Penn in this action nor does it point to any claim that it may have pending in

any court at this time against New Penn in connection with the events giving rise to this action. New Penn also argues that United Rentals has failed to preserve any claim that it may have against New Penn. Response of Defendant New Penn Motor Express, Inc. to Surreply Memorandum of Defendant United Rentals, Inc., etc. ("New Penn's Response") (Docket No. 31) at 2-4.

United Rentals cites two cases construing the word "adverse" in Fed. R. Civ. P. 33 before the word was removed in a 1970 amendment. Fed. R. Civ. P. 33, Advisory Committee Notes, 1970 Amendment, Subdivision (a). In *Carey v. Schuldt*, 42 F.R.D. 390, 392 (E.D.La. 1967), the plaintiff served interrogatories on a third-party defendant which objected on the ground that it was not a party "adverse" to the plaintiff, as the plaintiff had not filed any claims directly against it. The court noted the "general principle" that adverse parties are "those parties who are on opposite sides of an issue raised by the pleadings or otherwise presented by the record." *Id*. at 393. In applying this principle to the situation at hand, the court held as follows:

> In determining "adversity," the focus is on issues and not interests. Conflicting interests, without more, do not constitute "adversity." To be "adverse" the parties must oppose each other on an issue in the case. "Adversity" does not mean that one party must be seeking a judgment or recovery against the other party. But it does mean that one party strives to win a point at issue at the expense of the other. When two parties are contesting an issue, and the outcome of the litigation will be, or may be, different as to either party due to the determination of that issue, then they are "adverse" within the meaning of Rule 33.

Id. In *Powell v. Willow Grove Amusement Park*, 45 F.R.D. 274 (E.D.Pa. 1968), the same situation was presented, the same objection was made, and the court held that the parties were "adverse" for purposes of Rule 33 if they were on opposite sides of an issue or issues, "regardless of whether or not pleadings have been served by one on the other." *Id*. at 276.

New Penn seeks to distinguish these cases on the ground that "there was clearly a 'line' of potential liability" between the plaintiffs and the third-party defendants in those cases while there is

no such relationship between New Penn and United Rentals here. New Penn's Response at 2. However, that is not the basis for the cited decisions; the courts focused on the parties' opposing positions on an issue, not on the potential liability of one to the other. In the case at hand, New Penn seeks to limit the damages for which it may be liable to the plaintiff to a small percentage of the total amount sought by the plaintiff. If it is successful, United Rentals, the only other defendant, will be potentially liable for the remainder, a considerably higher percentage of the damages than it might otherwise have to bear. This makes New Penn and United Rentals "adverse" on the question before the court. I have been unable to locate any reported case law construing the word "adverse" in Rule 56, and the parties have cited none. Under the circumstances, I find the reasoning of the two district courts in the cited Rule 33 cases persuasive. United Rentals has standing to oppose New Penn's motion for partial summary judgment.

III. Factual Background

The plaintiff does not dispute any of the factual statements included in New Penn's statement of material facts submitted pursuant to this court's Local Rule 56(b) in support of its motion, and accordingly, to the extent supported by appropriate references to the summary judgment record, those factual assertions are deemed admitted by the plaintiff. Local Rule 56(c). United Rentals qualifies paragraphs 8, 17 and 18 of New Penn's statement of material facts, Defendant United Rentals, Inc.'s Opposing Statement of Material Facts (Docket No. 18), but, with one exception, those qualifications are not material to resolution of the pending motion. The exception, the second sentence of paragraph 8, is not supported by the record reference. *Id*. at [1]. As to all other paragraphs of New Penn's statement of material facts, United Rentals must also be deemed to have admitted those factual assertions that are appropriately supported by citations to the record.

At all relevant times, New Penn operated as an interstate motor carrier pursuant to a certificate of public convenience and necessity issued by the Federal Highway Administration. Affidavit of Morris C. Galante in Support of Motion for Partial Summary Judgment of Defendant New Penn Motor Express, Inc. ("Galante Aff.") (Docket No. 13) ¶ 4. At all relevant times, New Penn maintained tariffs, rates, rules and classifications that governed its interstate motor carrier operations and made them available to the shipping public on request. *Id*. ¶ 6. On August 27, 1999 New Penn received a shipment of freight described as a pallet containing an engine said to weigh 150 pounds from defendant United Rentals, Inc. ("United") for transportation to the plaintiff in Norway, Maine. *Id.* ¶ 7. At that time New Penn issued a uniform straight bill of lading for the shipment. *Id*. & Exh. C thereto. The space on the bill of lading where United could have inserted a declared value of the property being shipped was left blank. *Id*. ¶ 9 & Exh. D thereto.

After receiving the shipment at Amherst, New York New Penn weighed it and found that its actual weight was 877 pounds. *Id*. ¶¶ 7, 12. New Penn delivered the shipment to the plaintiff on August 31, 1999, at which time damage to the shipment was noted on the delivery receipt. *Id*. ¶ 13. The engines in the shipment were dropped by New Penn's driver while he was offloading them using a backhoe belonging to the plaintiff which the driver did not have permission to use. Affidavit of Caroline G. Thermaenius, attached to Response of Plaintiff, Lars T., Ltd. Against Defendant, New Penn Motor Express, Inc.'s Motion for Partial Summary Judgment ("Plaintiff's Opposition") (Docket No. 16), ¶¶ 3-11. On September 14, 1999 New Penn hired an inspector to investigate the damage and learned from her report that the shipment consisted of two engines that were used, not new. Galante Aff. ¶ 14.

New Penn maintains a rule in its tariff, NPME 100-A, Item 848, limiting its liability for loss of or damage to used equipment to 50 cents per pound, per package. *Id*. ¶ 16. Since January 1, 1996

New Penn has chosen not to offer a full liability rate to shippers on commodities such as used machinery; it accepts such shipments for transportation only at the "released rate" liability limit of 50 cents per pound. *Id*. ¶ 19.

IV. Discussion

New Penn contends that its liability for the damage claimed by the plaintiff is limited to $438.50, or 50 cents per pound, in accordance with the terms of its bill of lading and tariff. Memorandum in Support of Motion for Partial Summary Judgment of Defendant New Penn Motor Express, Inc. ("New Penn's Memorandum") (included in Docket No. 11) at 3. Its position is based on the Carmack Amendment, 49 U.S.C. § 14706, *id*., which provides, in relevant part:

> **(c) Special rules. —**
>
> **(1) Motor carriers. —**
>
> **(A) Shipper waiver. —** Subject to the provisions of subparagraph (B), a carrier providing transportation . . . may, subject to the provisions of this chapter . . ., establish rates for the transportation of property . . . under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.
>
> **(B) Carrier notification. —** If the motor carrier is not required to file its tariff with the [Surface Transportation] Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment or agreed to between the shipper and the carrier, is based.

49 U.S.C. § 14706(c). New Penn's tariff, which it made available to shippers on request, Galante Aff. ¶ 6, provides that its limitation of liability for used commodities applies when the consignor fails to identify the item or items as used: "Failure of the consignor to declare that the commodity is 'used' shall not alter the application of this item." *Id*. ¶ 16 & Exh. B.

The bill of lading, signed by Alfred Pearson on behalf of United Rentals as shipper, Exh. C to Galante Aff., includes the following relevant provisions:

> Where the applicable tariff provisions specify a limitation of the carrier's liability absent a release or a value declaration by the shipper and the shipper does not release the carrier's liability or declare a value, the carrier's liability shall be limited to the extent provided by such provisions.
>
> * * *
>
> Received, subject to the classifications and tariffs in effect on the date of issue of this Bill of Lading . . .
>
> * * *
>
> Shipper hereby certifies that he is familiar with all the bill of lading terms and conditions in the governing classification and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Id.

United Rentals contends that New Penn's limited liability rate as set forth in its tariff is unreasonable under the circumstances of this case and accordingly not subject to the protection of the Carmack Amendment; that it did not reach agreement with New Penn on the liability rate because the bill of lading was non-negotiable, a contract of adhesion, and inherently ambiguous; that it was not given a reasonable opportunity to choose not to accept New Penn's terms; and that the actions of New Penn's driver in using the plaintiff's front end loader without authorization takes this case beyond the scope of the Carmack Amendment. Defendant United Rentals, Inc.'s Memorandum of Law in Opposition to Defendant New Penn Motor Express, Inc.'s Motion for Partial Summary Judgment ("United Rentals' Opposition") (Docket No. 17) at 2-7. The plaintiff's opposition includes only the last of these arguments. Plaintiff's Opposition at 2-3.[1]

The First Circuit's most recent explication of the Carmack Amendment is found in *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617 (1st Cir. 1998). While the version

[1] The plaintiff also filed, approximately a month after New Penn filed its reply memorandum in which it raised the issue of United Rentals' standing to oppose its motion for partial summary judgment, a Motion to [sic] Leave to Adopt the Defendant United Rentals' Opposition Motion for Summary Judgment [sic] (Docket No. 24), in which it sought to adopt the arguments asserted by United Rentals in opposition to the motion for summary judgment "in the event that United Rentals lacks standing to oppose New Penn's Motion," *id*. at 1. Because I hold that United Rentals does not lack standing, this motion appears to be moot. It is not altogether clear from the text of the plaintiff's motion, however, that it is limited to the event of United Rentals being found to lack standing. To the extent that the motion seeks leave to adopt United Rentals' arguments even under the present circumstances, it is untimely and is (continued…)

of the Amendment at issue in that case was the predecessor of the current version which is applicable to the instant dispute, the salient points made by the court are apposite here.[2] The First Circuit held that, where the carrier's tariff provided that a shipment's value was limited to a certain maximum unless the shipper declared otherwise, the fact that the shipper left blank the space on the carrier's printed bill of lading for a declaration of the shipment's value meant that it agreed to the limited value, because the shipper is charged with knowledge of the tariff. *Id*. at 619. This was the "written agreement" required by the Carmack Amendment. *Id*. Noting that "the ordinary law of contracts and tariffs . . . makes a party pretty much responsible for whatever he or she signs and charges the shipper with knowledge of filed tariffs," *id*. at 620, the court held that the bill of lading at issue, by affording the shipper a choice between declaring a value for the consignment and accepting the limitation on value, provided the shipper the "fair opportunity" required by the Supreme Court in *New York, New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 135-36 (1953), *id*. at 619-21. The First Circuit specifically rejected the holding of the Sixth Circuit in *Toledo Ticket Co. v. Roadway Express, Inc.*, 133 F.3d 439 (6th Cir. 1998), and its own holding in *Anton v. Greyhound Van Lines*, 591 F.2d 103 (1st Cir. 1978), both of which are cited by United Rentals. To the extent that case law interpreting the former version of the Carmack Amendment remains viable, therefore, its requirements that the shipper be offered a choice and a reasonable opportunity to choose between

denied.

[2] The First Circuit notes that the current version, 49 U.S.C. § 14706, contains "[c]omparable provisions." 158 F.3d at 618 n.2.

the offered levels of liability appear to have been met in this case. *See also Opp v. Wheaton Van Lines, Inc.*, 56 F.Supp.2d 1027, 1037 (N.D.Ill. 1999). In addition, the bill of lading does constitute the necessary written agreement under the circumstances of this case.

United Rentals' argument that the limitation of New Penn's liability is unreasonable under the circumstances of this case is not well-developed. United Rentals' Opposition at 2-3. Apparently, it contends, without citation to authority, that the limitation generated by application of the tariff, $438.50, is unreasonable because it is less than the amount New Penn charged to deliver the engines ($478.64) and it never provided a refund based on the fact that the shipment actually contained used equipment rather than new, for which a higher charge was presumably imposed. *Id*. at 3. The latter argument might well have an effect on the calculation of damages, once liability is established, but it is not relevant to the reasonableness of the value limitation itself, which is the only statutory issue. The former argument is also unsuccessful. As the *Opp* court noted, a limitation on liability under the Carmack Amendment is reasonable under the circumstances unless the carrier engages in intentional destruction or theft of the property. 56 F.Supp.2d at 1038 (citing case law from the Third and Eighth Circuits). United Rentals has made no attempt to show any such activity on the part of New Penn in this case. While the issue was not raised in *Hollingsworth*, I note that the tariff involved in that case limited the carrier's liability to 10 cents per pound. 158 F.3d at 619. The 50 cent per pound limitation was not unreasonable in this case.

United Rentals' argument that the bill of lading constituted a contract of adhesion in this case is also undeveloped. While that fact alone makes it unnecessary for the court to consider the argument further, *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990), I note that, United Rentals has not provided any evidence that it was in an unequal bargaining position at the time its agent or employee signed the bill of lading or that it was inexperienced in shipping via common carriers.

Some evidence to this effect would be necessary to make such a claim colorable. *See, e.g., Schroeder v. Rynel, Ltd.,* 720 A.2d 1164, 1167 (Me. 1998).

United Rentals' next challenge, that the bill of lading is so ambiguous as to be unenforceable, is unavailing. United Rentals cites *Carmana Designs, Ltd. v. North Am. Van Lines, Inc.*, 943 F.2d 316, 322 (3d Cir. 1991) ("in balancing the interests of the parties, any ambiguity in the language of the bill of lading must be construed against the carrier"). It finds ambiguity in the following statement on the bill of lading: "Carrier's liability shall be limited to a maximum of $25.00 per pound, subject to released values provided in NMFC 100 & NPME 100 series tariffs." Exh. C to Galante Aff. Contrary to United Rentals' suggestion, this term merely sets an upper limit for liability on any shipment and is not inconsistent with a lower limit for a particular shipment. United Rentals points to "[t]he NMFC tariff at page 447" as an additional source of ambiguity in the bill of lading, United Rentals' Opposition at 4, but that document is not included in the summary judgment record and no reference is made to it in United Rentals' statement of material facts. Indeed, United Rentals' statement of material facts includes no reference to any of the terms of the bill of lading upon which it bases this argument, and its opposition accordingly cannot succeed on this basis.

Finally, both United Rentals and the plaintiff contend that the unauthorized actions of New Penn's driver takes this damage claim outside the scope of the Carmack Amendment. However, the scope of the statute is broad. The Carmack Amendment applies by its terms to "a carrier providing transportation or service" and "a motor carrier," 49 U.S.C. § 14706(c)(1)(A) & (B). A "carrier" is defined as "a motor carrier," 49 U.S.C. § 13102(3), which in turn is defined as "a person providing motor vehicle transportation for compensation," *id*. (12). The term "transportation" includes

> **(A)** a motor vehicle, . . . facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

> **(B)** services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, . . . handling, packing, unpacking, and interchange of passengers and property.

Id. (19). Unlike the warehouseman in *PNH Corp. v. Hullquist Corp*., 843 F.2d 586, 591 (1st Cir. 1988), upon which United Rentals relies,[3] United Rentals' Opposition at 7, whose activities (temporary storage services) constituted transportation under this definition but was not a motor carrier because he did not use a motor vehicle as defined in the relevant statutory provision, New Penn clearly used a motor vehicle, as defined at 49 U.S.C. § 13102(14), in the transport at issue here. For all that appears in the summary judgment record, the actions of New Penn's driver, unauthorized though they were, in unloading the engines were services related to the movement of the plaintiff's property and the delivery and handling of that property. Accordingly, I conclude that the Carmack Amendment is applicable, and that New Penn's liability is limited by the terms of the bill of lading.

V. Conclusion

For the foregoing reasons, I recommend that the motion of defendant New Penn Motor Express, Inc. for partial summary judgment limiting the direct damages for which it is liable to the plaintiff to the amount of $438.50 be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

[3] The opinion in *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377 (5th Cir. 1998), also cited by United Rentals, does not address the question whether a specific act or failure to act of a carrier or its employee is within the scope of the Carmack Amendment.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 15th day of August, 2000.

David M. Cohen
United States Magistrate Judge

LARS T LTD plaintiff	EDWARD L. DILWORTH, III, ESQ. [COR LD NTC] DOW'S LAW OFFICE, P.A. PO BOX 349 266 MAIN ST NORWAY, ME 04268 743-6351 ALAN J. PERRY, ESQ. [term 03/29/00] [COR LD NTC] KURTZ & PERRY 9 MARKET SQUARE BOX J SOUTH PARIS, ME 04281 743-5921
v.	
NEW PENN MOTOR EXPRESS INC defendant	WESLEY S. CHUSED, ESQ. [COR NTC] LOONEY & GROSSMAN 101 ARCH ST. BOSTON, MA 02110 (617)951-2800 LOUIS B. BUTTERFIELD, ESQ. [COR LD NTC] P. O. BOX 130 PORTLAND, ME 04112-0130 207/761-4411
UNITED RENTALS INC defendant	MARTHA C. GAYTHWAITE 761-0900 [COR LD NTC] FRIEDMAN, BABCOCK & GAYTHWAITE SIX CITY CENTER

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